IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 61929-2-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
JACOB LUTHER STRAWN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 20, 2009
	)	

Ellington, J. — Jacob Strawn appeals his conviction for communicating with a minor for immoral purposes. Strawn contends admission of evidence from an anonymous 911 caller violated his Sixth Amendment right of confrontation. We agree, but affirm because the error was harmless beyond a reasonable doubt.

BACKGROUND

The Mount Vernon Police Department received an anonymous 911 tip from an Idaho woman concerning inappropriate online conversations between an adult Mount Vernon man and the woman, who had posed as a 15 year old girl. The caller became alarmed when the man, screen named "26waguy," turned their conversation to sexual matters.

Detectives Jeff Nelson and Mike Marker began an investigation. Marker created an online persona of a 15 year old girl with the screen name "mandegirl15." Using this

persona, Marker initiated an online conversation with "26waguy," whose online profile identified him as 26-year-old "Jacob" and included a picture that resembled a person named Jacob Strawn.

The online conversation lasted a period of weeks and quickly became sexual. When "mandegirl15" informed him she was only 15 years old, "26waguy" indicated he had no problem with her age and proposed meeting in person to have sex.

Strawn did not appear at the first two arranged meetings, but "26waguy" continued to converse with "mandegirl15." They next arranged to meet at a particular gas station. "26waguy" indicated he would be wearing a black t-shirt and jeans, and would bring condoms. Detectives Nelson and Marker observed Strawn drive by the station, followed him, and arrested him when he stopped at another gas station. He was wearing a black t-shirt and jeans, and had a condom in his glove box.

During questioning, Strawn admitted he was "26waguy," that he had created the online profile, and that he had engaged in sexual conversations with "mandegirl15." Strawn also admitted he was told "mandegirl15" was 15 years old, knew she was too young, and had some idea that his conduct was illegal.

The State charged Strawn with communication with a minor for immoral purposes by amended information.

Before trial, Strawn unsuccessfully moved to suppress evidence of the anonymous 911 call. The evidence was admitted through the testimony of Detective Nelson, who said that he received the call expressing concern about online conversations the caller had with "26waguy" while posing as a 15 year old girl. The

caller forwarded Nelson the text messages from "26waguy," which were admitted over objection.

The jury convicted Strawn as charged; he appeals.

DISCUSSION

Strawn contends admission of the anonymous 911 caller's statements violated his Sixth Amendment right to confront witnesses.[1]

Under the Sixth Amendment, the accused has a right to confront witnesses and to meaningful cross-examination.[2] In Crawford v. Washington,[3] the United States Supreme court held the confrontation clause forbids admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. In Davis v. Washington,[4] the court considered whether statements made to law enforcement personnel during an emergency call and crime scene investigation were "testimonial" in nature. The court limited its discussion to the facts in that case, but indicated that statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[5]

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[1] Strawn does not challenge admission of the text messages provided by the anonymous caller.

[2] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). The Sixth Amendment was incorporated and made applicable to the states through the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[3] 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[4] 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Strawn argues the 911 caller's statements were testimonial because the caller contacted police for the express purpose of reporting Strawn's past actions. The State responds that the statements were nontestimonial under Davis because the inappropriate online conversations were ongoing when reported to police.

We find the State's argument unpersuasive. Even if the conversations were "ongoing," there clearly was no emergency as that concept has been interpreted in other cases.[6] And even if "communicating with a minor for immoral purposes" could sometimes present an emergent situation, the caller here was not actually a minor and was in no danger from Strawn. The purpose of her call was to report past conversations in order to prompt an investigation. We agree with Strawn that the 911 caller's statements were testimonial.[7] Admitting the statements was therefore error.

We conclude, however, the error was harmless in this case. "It is well

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[5] Id. at 822.

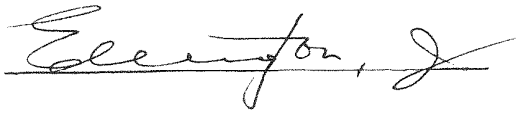
[6] See Davis, 547 U.S. at 828 (observing that statements made to 911 operator during assault were nontestimonial, but those made "after the operator gained the information needed to address the exigency of the moment" probably were not); 547 U.S. at 829 (holding comments made during crime scene investigation were testimonial, observing "[t]here was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything"); State v. Mason, 160 Wn.2d 910, 919–20, 162 P.3d 396 (2007) (emergency not "ongoing" when victim of violent kidnapping and robbery reported the crimes the next day in safe police station).

[7] The State also argues the statements were properly admitted as nonhearsay, offered only to provide context for the police investigation rather than for the truth of the matter asserted, or under the hearsay exception for excited utterances. As our Supreme Court has noted, however, "to survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." Mason, 160 Wn.2d at 922. See also State v. Moses, 129 Wn. App. 718, 728 n.12, 119 P.3d 906 (2005) (citing Washington and out-of-state cases declining to adopt the proposition that excited utterances are per se nontestimonial). Given our conclusion that any error was harmless, we need not reach the State's argument.

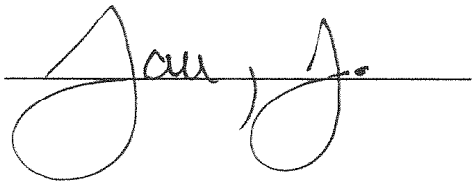
established that constitutional errors, including violations of a defendant's rights under the Confrontation Clause, may be harmless."[8] The violation is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.[9] That is so in this case.

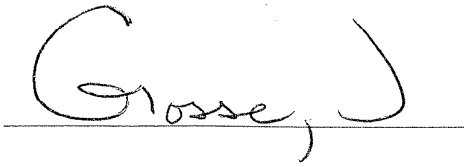
To convict Strawn of communicating with a minor for immoral purposes, the State had to prove that he electronically communicated with Detective Marker for immoral purposes of a sexual nature, believing Marker to be a minor. Marker testified that "26waguy" initiated sexual conversations with Marker, whom he believed to be a 15 year old girl, and with whom he ultimately arranged to meet for sex. Strawn admitted he was "26waguy," that he had sent those messages, and that he knew the girl was a minor. The untainted evidence is thus overwhelming and necessarily leads to a finding of guilt.

Affirmed.



WE CONCUR:





[8] Moses, 129 Wn. App. at 732.

[9] Id.